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No. 95-1127

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TRI-COUNTY INDUSTRIES, INC.,

Petitioner,

vs.

COUNTY OF MERCER, PENNSYLVANIA; MERCER COUNTY SOLID WASTE AUTHORITY; AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED

Should a court, in analyzing whether a waste flow control ordinance discriminated in purpose or effect under the dormant Commerce Clause, consider the facility selection process, the duration of the resulting facility designation, and the likelihood of amendment of the designation?

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Respondents Commonwealth of Pennsylvania, Department of Environmental Protection ("the Department")[1], Mercer County Solid Waste Authority and the County of Mercer hereby oppose the Petition for Writ of Certiorari filed by Tri-County Industries, Inc.

COUNTER-STATEMENT OF THE CASE

A. Pennsylvania's Municipal Waste Planning, Recycling and Waste Reduction Act and Mercer County Ordinance No. 6-1991.

Respondents deem the following information necessary to correct omissions in Part A of Petitioner's Statement of the Case:

Pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, §§4000.101 - 4000.1904 ("the Act"), facilities selected by a Pennsylvania county to provide the county with ten years of processing and disposal capacity do not have to be located within the county. *Harvey & Harvey, Inc. v. County of Chester,* 68 F.3d 788, 793 (3d Cir. 1995). Each county must consider alternative facilities, and "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities . . . from among the alternatives which were suggested to the county." *Id.*, citing 53 P.S. §4000.502(f)(2). The ten year planning term required by the Act is required by §4000.502(f) in addition to the sections cited by Petitioner.

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[1] The Department was formerly named the Department of Environmental Resources ("DER"), and was sued under that name in this litigation. However, under the Pennsylvania Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§1340.101 *et seq.*, the Pennsylvania General Assembly split DER into two agencies: the Department of Environmental Protection and the Department of Conservation and Natural Resources.

The facilities selected by a Pennsylvania county, and the process by which they were selected, must be set out in the county's municipal waste management plan. *Harvey*, 68 F.3d at 793, citing 53 P.S. §4000.502(f). If a county chooses to require that municipal waste be disposed of at a designated facility by means of an ordinance, the plan must include a copy of the proposed ordinance. 68 F.3d at 793, citing 53 P.S. §4000.502(l).

After a county-wide public process of ratification and adoption of the plan, the county submits the plan to the Department for review. 68 F.3d at 793, citing 53 P.S. §§4000.503(d); 504(c). If the plan is approved, it must be implemented. 53 P.S. §4000.303(a)(2); 501(a). Thereafter, the plan and the list of facilities designated by the county for processing and disposal may be revised by the county at any time but must be revised at least three years prior to the time that the remaining capacity for a county is exhausted. 68 F.3d at 793, citing 25 Pa. Code §272.251(b); 25 Pa. Code §272.251(a)(1). Addition or deletion of a facility to or from the plan requires the full "fair, open and competitive" selection process. 53 P.S. §4000.501; 25 Pa. Code §272.252.

Based on the advice of its consultant, Mercer County concluded that the best solution for this fairly small county would be to contract with a single disposal facility. 68 F.3d at 795. The county advertised its request for proposals ("RFP") nationwide. *Id.* at 795, 808. Although many of the 23 companies that obtained the RFP were located in Pennsylvania, others were located in Ohio, New York, Maryland, New Jersey, Minnesota and Louisiana. *Id.* at 795, 808.

Mercer County's RFP requirements applied equally to all disposal facilities, irrespective of their location. *Id.* at 795, 808. Mercer County selected the successful bidder from among the competitors. *Id.* at 795.

Mercer County's ordinance requires each hauler in the county to obtain a license and to haul municipal waste generated in the county to the landfill designated in the county plan, as it may be revised from time to time. *Id.* The ordinance, itself, does not identify a specific landfill.

SUMMARY OF ARGUMENT

The three-part test articulated by the United States Court of Appeals for the Third Circuit in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) is consistent with the recent Supreme Court decision in *C&A Carbone, Inc. v. Town of Clarkstown*, __ U.S. __, 114 S.Ct. 1677 (1994), and with the Second Circuit decision in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995). There are, therefore, no grounds upon which this Court should grant *certiorari*.

The three-part test is designed to assist courts in determining whether an ordinance discriminates in purpose or effect -- the test reiterated by this Court in *C&A Carbone*. The test takes into account, most importantly, that some waste facility designations are made pursuant to selection processes, which may or may not be discriminatory. A selection process that allows equal access to in-state and out-of-state competitors, for instance, and which is not otherwise discriminatory in purpose or effect, would be constitutional. Petitioner argues that the mere designation of a single facility in an ordinance is invariably discriminatory. Such a conclusion is contrary to this Court's dormant Commerce Clause jurisprudence.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IN *HARVEY* IS CONSISTENT WITH THIS COURT'S DECISION IN *C&A CARBONE*.

Contrary to Petitioner's assertions, *Harvey* does not conflict with *C&A Carbone*. As in *C&A Carbone*, the Third Circuit analyzed whether a local waste flow control ordinance discriminated against out-of-state competitors. In *C&A Carbone*, this Court invalidated the Clarkstown, New York, facility designation because it favored local enterprise by prohibiting competition from out-of-state firms. 114 S.Ct. at 1684. Factually unlike *C&A Carbone*, however, *Harvey* involved a facially fair, open and competitive facility selection process which was nationally advertised and available on equal terms to any bidder. *Harvey*, 68 F.3d at 808. Looking only at the end result of such a competitive process, i.e., the selection of a single, in-state facility, would be an inadequate analysis of the Constitutional question, given the extensive amount of competition that was allowed to occur. The Third Circuit recognized this, and developed a three-part test which takes into account competition at the selection stage, as well as duration of the designation of the successful competitor and ease of amendment of the ordinance. This test is to be applied, consistent with this Court's Commerce Clause jurisprudence, in determining whether an ordinance discriminates in purpose or effect.

This Court demonstrated in *C&A Carbone* that fair competition is at the core of dormant Commerce Clause jurisprudence. *C&A Carbone*, 114 S.Ct. at 1680, 1683. In that case, the town of Clarkstown, New York, designated a waste

processing facility in which it had a financial interest[2] as the only facility at which municipal waste in the town could be processed prior to disposal. The town "favored" this facility, and used the flow control ordinance to give it "an advantage over rival businesses from out of State." 114 S.Ct. at 1684. Focusing on the absence of competition, this Court said:

> The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 1683. Consequently, this Court found Clarkstown's ordinance to be discriminatory in "design and effect." *Id.*

Unlike the facts in *C&A Carbone*, the facts behind Mercer County's ordinance establish that the facility selection process promoted competition. Mercer County's Solid Waste Authority advertised nationally for bids for disposal service with a request for proposals. *Harvey*, 68 F.3d at 795, 808. The RFP requirements "applied equally to all disposal facilities, irrespective of their

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[2] Pursuant to a consent decree with the New York State Department of Environmental Conservation, Clarkstown agreed in 1989 to close its landfill and build a new solid waste transfer station on the same site. 114 S.Ct. at 1680. Clarkstown entered into a contract with a local private contractor who agreed to construct the facility and operate it for five years, after which the town would buy it for one dollar. *Id.* Until the town took ownership, the town guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge haulers a "tipping" fee of $81 per ton. *Id.* If the station received less than 120,000 tons in a year, the town promised to make up the tipping fee deficit. *Id.*

location." *Id.* The facility ultimately selected[3] was not in the county and had no financial relationship with the county (aside from a "relatively small" $1.00 a ton fee on waste disposed). *Id.* at 808.

In addressing whether the ordinance discriminated in purpose or effect, the Third Circuit pointed to the competitive selection process. The Court said:

> In operating its Plan, Mercer County made a significant attempt to open its designation process to out-of-state sites.

Id. Since this Court has not decided a waste flow control case in which there was such competition, the Third Circuit fashioned a three-part test to direct the District Court in analyzing the ordinance on remand.

The test looks at the designation process, the duration of the designation, and the likelihood of an amendment to add alternative sites. *Harvey*, 68 F.3d at 801. The test is designed to help ascertain whether "out-of-state bidders do not in practice enjoy equal access to the local market." *Id.* The test does not conflict with, nor replace, the "purpose or effect" test reiterated by this Court in *C&A Carbone*. It is, in fact, relevant to both prongs of the "purpose or effect" test. As the Third Circuit emphasized, "a plaintiff challenging a designation scheme like the one at issue here must show that the designation process favors, either purposely or in effect, in-state sites." *Id.* at 802.

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[3]Petitioner submitted a bid in response to the RFP, but was not selected. (*Petition, Statement of the Case*, p. 3.)

Nine months prior to issuing its decision in *Harvey*, the Third Circuit addressed New Jersey's regulatory selection process in the case of *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995). Contrary to Petitioner's contentions, the Third Circuit in *Harvey* accurately characterized its own legal analysis in *Atlantic Coast*, and issued a consistent decision. The Third Circuit recognized in both cases that a law may be discriminatory in purpose or effect. *Harvey*, 68 F.3d at 802; *Atlantic Coast*, 48 F.3d at 710, 717. In *Atlantic Coast*, because the Third Circuit found that the New Jersey selection process emphatically favored in-state facilities over out-of-state facilities, the Third Circuit found the regulations to be discriminatory and remanded the case to the District Court for further proceedings. 48 F.3d at 718.

Petitioner misconstrues *Atlantic Coast* as having found New Jersey's regulations discriminatory regardless of the selection process. New Jersey's regulations, however, *defined* the selection process. The regulations instructed counties and waste districts to select and designate facilities, and to give a strong advantage in the selection process to in-state facilities. This is what the Third Circuit found objectionable. The Third Circuit made this clear, in a phrase *omitted* by Petitioner in its rendering to this Court:

> More specifically, New Jersey is regulating the market for solid waste processing and disposal services in each of the districts by directing district consumers of those services to utilize a favored service provider who, ***in the absence of exceptional circumstances***, operates a local facility.

48 F.3d at 713 (Emphasis added to show deletion by Petitioner). The court was analyzing the entire process, and not merely the end result. The process is significant when it allows for competition.

Finally, Petitioner puts misplaced importance on the selection of a *single* disposal facility. Petitioner wrongly asserts that *C&A Carbone* compels finding the Mercer County ordinance discriminatory because the ordinance designates a "single" disposal facility.[4] *Petition*, p. 8. It was not the number of facilities in *C&A Carbone* that determined whether there was discrimination, rather, it was whether "investment from outside", or "access to a local market", had been impermissibly interfered with, or "squelched". 114 S.Ct. at 1680, 1683.[5]

This Court found the ordinance in *C&A Carbone* discriminatory because the ordinance, in its design and effect, deprived competitors, including out-of-state firms, of access to a local market. 114 S.Ct. at 1680, 1684. To interpret *C&A Carbone* as holding that the number of facilities selected for waste disposal services is determinative of a Commerce Clause violation would vitiate this Court's "sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, __ U.S. __, 114 S.Ct. 2205, 2215 (1994). As this Court recently noted, Commerce Clause jurisprudence "is not so rigid as to be controlled by the form" of the alleged barrier to commerce. *Id.*

If Commerce Clause jurisprudence were that rigid, then every selection process would be discriminatory, no matter how fair, no matter how open, no matter how competitive the process had been. The Commerce Clause does not, as Petitioner argues, prohibit a competitive selection process; and unsuccessful bidders,

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[4] The designation actually occurred in the Mercer County municipal waste plan, not in the ordinance.

[5] This Court has also said: "the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978).

like the Petitioner, cannot make out a violation of the Commerce Clause merely because someone else won the bid. A fair, open and competitive selection process will always result in some bidders being selected, and some being rejected. The losing bidders, however, have not been denied access to the local market as long as the selection process was fair, open and competitive.

In establishing its three part test, the Third Circuit recognized that a selection process which was fair, open and competitive on its face, might nonetheless have a discriminatory purpose or effect. As a result, it remanded the case so that the district court could make the findings needed to implement this Court's standard established in *C&A Carbone*.

II. THE THIRD CIRCUIT'S DECISION IN *HARVEY* IS CONSISTENT WITH THE SECOND CIRCUIT'S DECISION IN *SSC CORP. v. TOWN OF SMITHTOWN*, 66 F.3d 502 (2d Cir. 1995).

Petitioner argues that *Harvey* conflicts with the Second Circuit's decision in *SSC Corp.* because the Third Circuit developed a three-part test which the Second Circuit did not. There is, however, no conflict. The three-part test is appropriate to analyze an ordinance when the ordinance implements a competitive selection process, and such a process did not exist in *SSC Corp.*

Once again, the existence or absence of competition is pivotal. There is no evidence in *SSC Corp.* of the ordinance implementing a competitive selection process. In *SSC Corp.*, Smithtown, New York, developed an ordinance in response to a shortage of landfill space by arranging with the neighboring town of Huntington for the construction of a garbage incinerator. The incinerator was to be owned and operated by a private company, but financed by the towns. 66 F.3d at 505. To ensure a steady flow of waste to the Huntington incinerator, and thus to ensure a steady flow of tipping fees, Smithtown passed a flow control

ordinance requiring all residential and commercial waste to be disposed at the incinerator. *Id.* at 507. Smithtown then entered into contracts with private haulers to collect the waste. *Id.* at 505. The contracts required the haulers to deliver the waste to the incinerator.[6] *Id.*

The ordinance provided that haulers could dispose of the town's waste only at a solid waste facility designated by the town board. Separately, the town designated the incinerator. As in *C&A Carbone*, there is no indication of any competitive process required by the State of New York or utilized by the town to select the incinerator. The Second Circuit found the ordinance to be "indistinguishable" from Clarkstown's, and therefore affirmed the District Court's invalidation of the ordinance. *Id.* at 518.

In contrast, Mercer County's ordinance was based on competition -- significant competition -- and nothing on its face prevented competition or a fair result. The ordinance implements the county's waste management plan, which was designed to assure capacity through a fair, open and competitive selection process. The fair, open and competitive selection process makes the Mercer County ordinance different from that involved in *SSC Corp.*, just as it made it different from that involved in *C&A Carbone*.

The facts of *Harvey* called for the development of the Third Circuit's three-part test because of the existence of the competitive selection process. The facts in *SSC Corp.* did not call for such a test because there was no selection process. The *Harvey* decision, therefore, does not conflict with *SSC Corp.*

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[6] The Second Circuit upheld the collection contracts under the market participant theory, reversing the District Court.

CONCLUSION

For the foregoing reasons, Respondents Commonwealth of Pennsylvania, Department of Environmental Protection, Mercer County Solid Waste Authority, and the County of Mercer respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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